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No. 85-1593

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

COUGHLIN, JAMES and COUGHLIN, PATRICIA, his wife,

Petitioners,

v.

WESTINGHOUSE BROADCASTING AND CABLE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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PARTIES TO THE PROCEEDING

The parties to this proceeding are James Coughlin, Patricia Coughlin, and Westinghouse Broadcasting and Cable, Inc., a wholly-owned subsidiary of Westinghouse Electric Corporation.

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Respondent Westinghouse Broadcasting and Cable, Inc. respectfully submits that the petition for certiorari should be denied because it raises no questions of compelling significance that merit this Court's attention. The decisions below did no more than to apply the definition of actual malice to which this Court has adhered for a quarter century and to resolve a discovery issue in full accordance with Pennsylvania law. The petition thus does not present any misapplication of current law or conflict among decisions, but only petitioners' desire to change that law. However, the facts of this case present no compelling reason to do so.

STATEMENT OF THE CASE

This is an action for libel. Petitioner James Coughlin, a Philadelphia police officer, contends that Westinghouse defamed him in a television broadcast dealing with police corruption in connection with a club that acted as an "after-hours" bar in Philadelphia. A portion of the broadcast showed Coughlin leaving the club at about 4:00 A.M. carrying an object that appeared to be an envelope. Coughlin claims that the report made him appear to be corrupt. After extensive discovery, the district court entered summary judgment in favor of Westinghouse. It held that, although the truth of the broadcast statements about Coughlin was disputed, Coughlin had failed to submit evidence sufficient to create a genuine issue of fact in support of the claim that Westinghouse broadcast the statements with actual malice. A. 37-45.* The court of appeals affirmed without dissent. A. 2-24.

Petitioners' ten-page "Statement of the Case" contains a series of misstatements, half-truths, and innuendos that are unsupported by the record or the opinions below and that falsely portray the state of the record. Rather than engage in a point-by-point refutation, this brief will outline the essential facts material to the issues raised in the petition.

In 1981, residents of a Philadelphia neighborhood complained to Westinghouse's television station in Philadelphia, KYW-TV, about "illegal and disruptive activities" (A. 42) at a private club on American Street and about the failure of the police and state liquor authorities to remedy the misconduct. KYW investigated the situation for many months, and conducted surveillance of the club from a low-light camera in a van and,

*Pages with an "A." prefix are in the appendix to the petition for certiorari. Pages with an "S.A." prefix are in the supplemental appendix bound with this brief in opposition to the petition.

later, at a window in a neighbor's house. The investigation revealed that the club served liquor to persons after 3:00 A.M., the time at which it was required to close under state law; that persons leaving the club after those hours often were rowdy and disruptive and disturbed the peace of the neighborhood; and that police officers frequently visited the club while liquor was being served after 3:00 A.M. without making arrests, reporting violations, or otherwise correcting the misconduct or following police directives relating to club checks.

As stated by the district court (A. 42), the reporters felt that the activities they observed were inconsistent with proper law enforcement. Their suspicions were reinforced by a 1974 Pennsylvania Crime Commission report that noted the potential for corruption that exists when police officers monitor private clubs. The supervisor of the Crime Commission's investigation confirmed that the activities videotaped by KYW were similar to those discussed by the Commission.

The portion of the KYW report relating to Coughlin dealt with events on the morning of October 11, 1981. KYW's surveillance camera recorded persons entering the club after 3:00 A.M. At 3:52 A.M., a police officer (not Coughlin) entered the club, stayed for five minutes, and then left while about 50 people remained inside; contrary to police regulations, he did not inform the police radio of his whereabouts. At 4:04 A.M., he returned to the club (again without informing police radio) and stayed until 4:11 A.M. Meanwhile, Coughlin told the police radio dispatcher to "hold him out" at headquarters for paperwork. Soon after the other policeman left the club, Coughlin drove up to the club, slowly backed up, looked over the street, and drove off. Coughlin returned several minutes later. He entered the club at 4:17 A.M., without reporting to police radio and without donning his standard uniform attire (jacket, hat, and nightstick). Less than a minute later, he exited the club carrying a

paper object in his hand that two KYW reporters who were eyewitnesses identified as an envelope.

KYW obtained the police logs and incident reports of Coughlin and the other policeman observed at the club on October 11. The logs did not show the policemen at the Club at the times the KYW camera recorded them there. Coughlin's log book showed a twenty-minute gap for the period he was at the club.

KYW asked to interview the police officers seen on the videotape. The Police Department refused to arrange interviews, but granted permission for KYW to approach the policemen outside of formal channels. Coughlin had been informed by the Police Department of accusations that he had taken an envelope from the club, and he had heard rumors of the KYW investigation. On February 10, 1982, KYW went to his home to interview him as he returned from work, but Coughlin refused to be interviewed. Although the petition for certiorari (at 9, 12) asserts that Coughlin was not given a reasonable opportunity to state his side of the story, Coughlin himself testified during his deposition that he made a voluntary decision not to talk to KYW.

Though unable to talk with Coughlin, KYW interviewed a number of police officials, including the Police Department's deputy commissioner, chief inspector, and public information officer. Interviews also were held with neighborhood residents and their counsel; present and former officers of the club; state liquor authorities; the Philadelphia district attorney, and a Pennsylvania Crime Commission lawyer who said that the events recorded by KYW suggested that Coughlin "was not involved in official business" (S.A. 23-24).

KYW aired the investigative report, entitled "After Hours on American Street," on February 17 and 18, 1982, and repeated segments of the report along with follow-up interviews on February 19. The transcript of

the report is very lengthy, but pertinent excerpts are appended to this brief as a supplement. The report included the videotape of Coughlin made on October 11 and described those events as "the most suspicious police activity [KYW] saw on American Street." S.A. 15, 19. While showing Coughlin exiting the building with a paper object in his hand, the report noted that Coughlin had told the police dispatcher that he was out at headquarters doing paperwork and added, "Well, the only paperwork we saw him doing was carrying this envelope out of the club less than a minute after he went in." S.A. 16, 20. On the February 19 telecast, KYW interviewed Tom Garvey, the president of the Fraternal Order of Police, on the air and asked him about the police conduct shown in the report. Garvey responded that Coughlin had been a rookie cop who did nothing wrong and that the object that had been shown in his hand was a police incident report log (or "48 book"), not an envelope. S.A. 28-29.

The Police Department then conducted its own investigation of the events reported by KYW. Using laboratory tests on the videotape, among other things, it, along with the Federal Bureau of Investigation, tried to identify definitively the object in Coughlin's hand, but they were unable to reach an official conclusion concerning its identity. A. 42. Police officials concluded that the object reasonably could be said to look like either a "48 book" or an envelope. *Id.* The Police Department's internal charges against Coughlin have not been decided.

Coughlin sued for libel, claiming that the KYW report falsely accused him of taking a bribe. His wife sued for loss of consortium. The parties engaged in extensive discovery, including 36 depositions, a large number of interrogatories, and production of numerous documents. Westinghouse objected to a small segment of petitioners' discovery that sought material protected from disclosure under a Pennsylvania statute protecting news sources

and editorial materials. Petitioners moved to compel discovery, arguing that the statute infringed on their state and federal constitutional rights. The district court rejected that argument and denied the motion. A. 28-34.

At the close of discovery, Westinghouse moved for summary judgment, arguing primarily that the individual statements in the broadcast were true and that, in any event, there was no evidence that it had acted with actual malice. The district court held that the dispute about whether Coughlin was carrying an envelope or a "48 book" presented a genuine issue of material fact that precluded summary judgment on the truth issue. A. 37-38.

With respect to truth, the petition for certiorari contains repeated assertions that its version of the facts regarding what Coughlin was carrying is uncontroverted, pointing to the district court's statement (A. 38) that "Defendant has not seriously challenged plaintiffs' explanation for the events of October 11, 1981." Of course, since Westinghouse had moved for summary judgment, the rules of procedure precluded it from contesting factual issues while arguing its motion. Obviously, the factual version in the petition *is* disputed; KYW's reporters continue to believe that Coughlin carried an envelope, while Coughlin protests that he did not. That dispute is not at issue here, however.

The district court agreed with Westinghouse that petitioners were required to prove actual malice because Coughlin, as a police officer, was a public official. A. 38-39. Petitioners do not challenge that holding. The court declined to determine whether there was sufficient evidence to prove actual malice with "convincing clarity," holding that that standard applies only to trials, not summary judgment motions. A. 44-45, *citing Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *cert. granted*, 473 U.S. ____, 105 S. Ct. 2672 (1985) (No.

84-1602). Nevertheless, upon surveying petitioners' "evidence" of actual malice in light of the deferential summary judgment standard in Rule 56 of the Federal Rules of Civil Procedure, the court concluded that petitioners had failed to create even a triable issue of fact. Accordingly, the court entered summary judgment for Westinghouse. A. 39-43.

The court of appeals affirmed in a per curiam opinion that adopted the reasoning of the district court. A. 5. In a separate concurrence, Judge Becker agreed with that conclusion, and suggested that he reached that result after engaging in a plenary review of the record. A. 7, 24. The court of appeals sought extensive briefing on petitioners' complaint that they were denied discovery, focusing mainly on the validity of the Pennsylvania statute protecting sources and editorial materials in light of the right to reputation under the Constitution of Pennsylvania. It concluded that the statute "suffers from no state or federal constitutional infirmity." A. 6. After an extensive analysis of the state and federal constitutional arguments, Judge Becker agreed. A. 7-24. Petitioners did not seek rehearing.

REASONS FOR DENYING THE WRIT

I. THERE ARE NO SPECIAL OR IMPORTANT REASONS WARRANTING REVIEW OF THIS CASE BY THIS COURT.

The petition fails to state any grounds that merit review by this Court.

First, petitioners do not suggest that the decision below conflicts with decisions of this Court. Indeed, the petition studiously avoids reference to the decisions of this Court — particularly *St. Amant v. Thompson*, 390 U.S. 727 (1968) — that compelled the courts below to hold as they did.

Second, there is no conflict between the decision of the court of appeals in this case and that of any other court of appeals. Indeed, the petition concedes (at p. 15) that there is a dearth of authority supporting its position. The decision on which petitioners most heavily rely, *Tavoulareas v. Piro*, 759 F.2d 90 (D.C. Cir. 1985), was vacated by the court that entered it and now is under reconsideration in banc. 763 F.2d 1472, 1481 (D.C. Cir. 1985).

Third, the decision below does not conflict with the decision of a state court of last resort. As Judge Becker's concurring opinion in the court of appeals (A. 7-24) demonstrates, the court of appeals was very sensitive to the holdings of the Supreme Court of Pennsylvania in deciding the due process issue advanced by petitioners in light of the competing interests at stake under state and federal law.

Fourth, the petition does not present novel questions of federal law and raises none of the issues now pending before this Court. Petitioners were not required to respond to an unsupported summary judgment motion. *Cf. Celotex Corp. v. Catrett*, No. 85-198. Nor were they required to meet a "convincing clarity" burden of proof. *Cf. Anderson v. Liberty Lobby, Inc.*, No. 84-1602.

Finally, petitioners have not and surely could not claim that the court of appeals engaged in a major departure from the accepted and usual course of judicial proceedings or sanctioned such a departure by the district court. In the district court, petitioners were given an opportunity to conduct discovery to the fullest extent permitted by Pennsylvania law. The procedure employed by the district court on summary judgment, including the standard of proof, was the most favorable that petitioners could have requested. The court of appeals fully reviewed the record; the judges viewed a videotape of the broadcast at issue, and, according to Judge Becker, performed a plenary review of the actual malice issue. *See* A. 24. Even though petitioners themselves deemphasized the discovery issue on appeal, the court of appeals asked for extensive supplemental briefing, and, as Judge Becker's opinion makes clear, considered the issue in depth. Thus, there was no departure from the proper course of judicial proceedings in this case, either in the district court or on appeal.

Petitioners make no effort whatsoever to explain what special and important reasons under Rule 17 of this Court justify issuance of a writ. They merely seek another review of the record, an unwarranted exercise in light of the correct application of current law to that record by the courts below. Petitioners do not like the current law and suggest that it should be changed. But that law is based on more than 25 years of First Amendment jurisprudence painstakingly crafted to balance the competing interests in this area. *See Philadelphia Newspapers, Inc. v.* Hepps, 475 U.S. ____, 54 U.S.L.W. 4373 (1986). The facts of this case do not merit reconsideration of those decisions.

Because petitioners have raised no special and important reasons justifying the attention of this Court, the petition for certiorari should be denied.

II. THE REASONS STATED BY PETITIONERS DO NOT PRESENT A SUFFICIENT LIKELIHOOD OF REVERSAL TO MERIT REVIEW BY THIS COURT.

A. The Courts Below Correctly Determined That Westinghouse Was Entitled to Summary Judgment Because There Was No Genuine Issue of Material Fact Relating to Actual Malice.

The main thrust of the petition is that the lower courts erred in concluding that petitioners had failed to present evidence of actual malice that would enable them to reach a jury. Petitioners contend that the courts below acted incorrectly in the way they employed the summary judgment rules or in applying the legal standards for actual malice. Neither contention has merit.

1. The courts below correctly applied the summary judgment rules to search for triable issues of fact.

The rules provide that summary judgment "shall be rendered forthwith if the [evidence shows] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). As this Court emphasized just one month ago, to preclude summary judgment an issue of fact must be "genuine," and "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. ____, 54 U.S.L.W. 4319, 4322 (1986).

Petitioners complain (at pp. 15, 21) that the courts below somehow departed from this standard and engaged in "factfinding," but they do not identify how the lower courts did so. The complaint that the lower courts

engaged in "weighing the evidence" (p. 15) seems to relate merely to the fact that they assessed petitioners' purported "evidence" of actual malice to determine whether it was sufficient to present to a jury. But that is precisely the courts' role under Rule 56. "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Note, 28 U.S.C. App., p. 626 (1982 ed.); *see Matsushita, supra,* 54 U.S.L.W. at 4322.

The one example of "factfinding" that petitioners cite is a strained misconstruction of the district court's opinion. At page of 21 of the petition they complain about the district court's statement (A. 41-42) that "the evidence relevant to the state of mind of defendant's employees indicates that, although they did not seriously explore other possible explanations for Coughlin's behavior, the conclusions which they drew based on their observations were reasonable." In suggesting that that statement was a finding of fact, the petition takes the statement out of context. In making its statement, the district court was determining whether petitioners' evidence was "sufficient to create an issue as to whether defendant's statements were 'so inherently improbable that only a reckless man would have put them in circulation.' " A. 41, *quoting St. Amant v. Thompson,* 390 U.S. 727, 732 (1968). Assessing all of the evidence before it, the district court concluded that no rational jury could find that the alleged accusations of corruption were too unreasonable to be believed. That assessment was a matter committed to the district court's determination under Rule 56.

2. The courts below correctly applied this Court's decisions defining actual malice.

Petitioners do not contend that they submitted any evidence that Westinghouse acted with actual malice because it knew it was publishing false statements. Rather, they argue that a jury should have been permitted to determine whether Westinghouse acted with reckless disregard for the truth. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

This Court has explained this second prong of actual malice many times. Under it, "[u]tterances honestly believed" are protected, "even if [they are made] out of hatred," for "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." *Garrison v. Louisiana*, 379 U.S. 64, 73-74 (1964). "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). "[S]ubjective awareness of probable falsity" is necessary for this type of actual malice to exist." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974).

The district court faithfully applied these standards in assessing petitioners' "evidence" of actual malice. It looked for any evidence that Westinghouse doubted the truth of its broadcast or subjectively was aware that the broadcast probably was false. It found none. A. 39-45.

That Westinghouse did not act with actual malice is abundantly clear from this record. Not only is there no direct evidence of subjective doubts by Westinghouse personnel, but all of the facts point toward an effort by Westinghouse objectively to report a sincerely believed and believable story of great importance to the public. Eyewitnesses stated that Coughlin carried an envelope

out of the club, and the videotape image was fully consistent with that account. Those basic facts, together with additional evidence — *e.g.*, the concerns raised by a Pennsylvania Crime Commission report, the failure of the police to stop repeated incidents of misconduct and violations at the club despite frequent complaints, the objectively suspicious conduct of Coughlin in appearing to "case" the club area before returning to enter it, the false reporting by Coughlin of whereabouts different from the club and his failure to enter his stop at the club in his logbook, the similar failures of the other policeman at the club that night, the failure of Coughlin to report his entry into the club to the police radio dispatcher, and his entry of the club out of uniform — made any statements about Coughlin's conduct on October 11 completely justifiable.

In arguing that they presented evidence that would permit a rational jury to reach a contrary conclusion, petitioners completely ignore this Court's definition of what actual malice requires. Indeed, they do not even cite decisions such as *Garrison*, *St. Amant*, and *Gertz*. A quick review of the "evidence" on which petitioners rely makes clear that it has no bearing on whether Westinghouse had subjective doubts about the truth of its broadcast.

1. *The claim that Westinghouse harbored hostility toward the police (Pet. at 16).* All of the testimony on this subject is undisputed; both Westinghouse personnel and Police Department officials testified that there was no hostility. A. 40. Petitioners' "evidence" is no more than unsupported speculation — denied by both the police and Westinghouse — that hostility resulted from past incidents involving the police and reporters, such as the incident related in the petition (at 10-11) in which the police investigated the Westinghouse surveillance van on American Street in response to an anonymous tip. In any event, such "evidence" is immaterial, for preexisting hostility does not tend to establish subjective

doubts about the truth of a story. *See Old Dominion Branch No. 496, Letter Carriers v. Austin*, 418 U.S. 264, 281-82 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 n.18 (1971); *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6, 9-11 (1970); *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966); *Garrison, supra*, 379 U.S. at 73-74, 77-79.

2. *The claim that Westinghouse failed properly to investigate the story although it could harm Coughlin's reputation and even though KYW was under no time pressure (Pet. at 16-18).* Contrary to petitioners' rhetoric, the undisputed facts showed that Westinghouse's investigation was extensive. KYW interviewed a number of police officials. It tried to interview Coughlin, but Coughlin voluntarily refused. To this day no one has been able definitively to determine what was in Coughlin's hand on October 11. But even if KYW's investigation might have been more thorough, that fact would not show actual malice. Inadequacy of investigation is not proof of doubts about truth. *See St. Amant, supra*, 390 U.S. at 731; *New York Times, supra*, 376 U.S. at 288. That result should not change merely because the story is not prepared under time pressure and it results in a serious accusation; otherwise, a trial would have to be held in every libel case arising from investigative journalism leading to a potentially harmful charge.

3. *The claim that the conclusions drawn by Westinghouse in the broadcast "were invariably the most injurious speculations imaginable" (Pet. at 18-19).* There is no evidence that Westinghouse harbored doubts about the truth and then deliberately chose to select an interpretation of events adverse to Coughlin. *Cf. Rebozo v. Washington Post Co.*, 637 F.2d 375, 382 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981). Westinghouse's alleged interpretation of the events involving Coughlin on October 11 was, on the facts known to it, much more

reasonable than the story of negligent police work that Coughlin later offered to explain them. Because the First Amendment does not permit a media defendant to be condemned for drawing non-reckless, let alone reasonable, conclusions about the facts before it, this purported "evidence" can have no bearing on petitioners' case. As this Court stated in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), a media defendant does not lose the "First Amendment's broad protective umbrella" merely because it chose " 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities.' " 466 U.S. at 512-13, *quoting Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971).

4. *The claims of an "attempt to silence" Coughlin with an on-camera interview and of failure to retract accusations (Pet. at 19-20).* Coughlin could have spoken to KYW's reporters at any time, but, as he stated during his deposition, he voluntarily chose not to do so. The suggestion that Westinghouse sought to "silence" Coughlin by approaching him for the interview with a television camera is not a serious argument. As soon as someone came forward to express another view about Coughlin's conduct, Westinghouse broadcast that view on the air in prime time. S.A. 28-29 (interview of T. Garvey). Westinghouse's failure to retract its story after it was aired surely cannot be evidence that Westinghouse had serious doubts about the truth of its story before it was aired. *See New York Times, supra*, 376 U.S. at 286-87. Westinghouse has failed to retract because, to this day, petitioners' version of the truth has not been proven; even the FBI has been unable to determine what was in Coughlin's hand on October 11. A. 42.

None of petitioners' "evidence" is probative of a reckless disregard by Westinghouse for the truth. Taken either separately or in combination, the items listed by petitioners provide no basis upon which a rational jury could conclude that Westinghouse acted with actual

malice. This was the conclusion reached by the district court and the court of appeals, and it was fully consistent with the precedents of this Court.

B. This Case Presents No Cause for Doing Away With the Actual Malice Requirement.

Recognizing that their "evidence" is not really probative of actual malice as defined by this Court, petitioners suggest, timidly, that the actual malice standard itself should be reconsidered. Pet. at 13-14, 21. The offhand nature of the suggestion discloses that petitioners are hardly serious about it, and Westinghouse will not burden this Court with a lengthy response. This case does not warrant a reformulation of existing First Amendment law.

The actual malice requirement was fashioned to afford "breathing space" to free expression about public officials and public issues by precluding punishment of statements honestly believed to be true. *See New York Times, supra*, 376 U.S. at 271- 72. The Court recognized that a defense of truth does not fully satisfy this objective, for proof of truth often is difficult and inexact. *Id.* at 279. The Court has adhered to this view for nearly three decades. *See generally Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. ____, 54 U.S.L.W. 4373 (1986).

This case illustrates the wisdom of the Court's reasoning. Although the truth of some aspects of Westinghouse's report remains contested and has eluded determination by law enforcement investigators, there is no doubt that the subject of the report was of immense public significance, and the record makes clear beyond any genuine dispute that Westinghouse acted with a sincere belief in its truth. Indeed, as a result of the report and law enforcement investigations caused by it,

the club featured in the report was closed by the authorities and police procedures were re-examined. The public interest could not be served by a change in the law that would deter such press investigations of police corruption and violations of law.

Petitioners do not state what changes they would make to current law that would not eviscerate First Amendment protections. While they quote from Justice White's opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. ____, 105 S. Ct. 2939, 2948-54 (1985), they carefully avoid mention of Justice White's suggestions that actions for damages be replaced with declaratory judgment proceedings to determine truth and that strict limitations be placed on damage awards. Petitioners wish to recover substantial compensatory and punitive damages in this case.

Petitioners' argument is nothing more than the tired refrain of many unsuccessful plaintiffs — that the law should be changed to permit them to recover. This case does not merit a wholesale re-examination of libel law under the First Amendment, and certiorari should not be granted to entertain petitioners' suggestion.

C. There Is No Merit to the Contention That an Evidentiary Privilege for Reporters' Materials Deprives Petitioners of Due Process of Law.

Petitioners' final argument is that this Court should declare shield statutes unconstitutional in libel cases. Not surprisingly, petitioners cite no authority that ever has held a shield statute or any other evidentiary privilege invalid in a case such as this one, and, so far as Westinghouse can determine, no such authorities exist. Petitioners' argument is without merit.

The Pennsylvania Shield Law, 42 Pa. C.S. § 5942, provides that the press may not be required to disclose the sources of its information. It is just one of a number

of Pennsylvania enactments that create evidentiary privileges to foster an important interest in the confidentiality of certain types of communications and information. As Judge Becker noted in his opinion in the court of appeals (A. 23), at least 26 states have shield statutes. The district court's application of the Pennsylvania Shield Law in this case was fully in accord with decisions of the Supreme Court of Pennsylvania. *See Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 485 A.2d 374 (1984), *rev'd on other grounds*, 475 U.S. ____, 54 U.S.L.W. 4373 (1986); *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

Petitioners suggest that the Shield Law is unconstitutional as applied in libel cases because it makes it difficult for plaintiffs to obtain evidence of actual malice, thereby depriving them of their right to reputation under the Constitution of Pennsylvania without due process of law. Much of petitioners' argument is devoted to establishing that they have a state-created liberty or property interest in reputation, a fact not disputed by Westinghouse. However, as Judge Becker explained in his thorough analysis of the question (A. 9-18), the Pennsylvania constitutional right to reputation is not itself infringed by the Shield Law or its effect on proving actual malice. *Accord, Hatchard v. Westinghouse Broadcasting Co.*, ____ Pa. Super. ____, 504 A.2d 211 (1986), *pet. for allowance of appeal filed*, No. 173 E.D. Allocatur Dkt. 1986 (Pa., Feb. 24, 1986).

The result is no different under the federal due process clause. This Court already has observed that states deserve wide deference in their decisions to enact shield laws (*Branzburg v. Hayes*, 408 U.S. 665, 706 (1972)), and petitioners have offered no reason to interfere with the state enactments. As Judge Becker concluded in his analysis of the due process question (A. 18-24), the Shield Law and its effect on proving actual malice do not deprive anyone of reputation. While the Shield Law may

make proof of actual malice more difficult, it does not make such proof impossible. *See Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376, *cert. denied*, 459 U.S. 907 (1982). Any risk created by the statute that libel plaintiffs will be unable recover damages for harm to reputation is more than outweighed by the substantial free press interests that Pennsylvania has sought to advance by enacting it. *See* A. 23-24. *Cf. Philadelphia Newspapers, supra*, 54 U.S.L.W. at 4376 (Pennsylvania Shield Law's effect on obtaining evidence of truth is not sufficient to alter requirement that plaintiff has burden of proving falsity).

Moreover, in this case the limitations placed on discovery because of the Shield Law were, at most, minimal. The three dozen depositions and other extensive discovery afforded petitioners an ample opportunity to find evidence of actual malice, if any existed. Petitioners' one example of potential evidence of actual malice that they claim they could not obtain because of the Shield Law is a blatant misrepresentation of the facts. At page 13, the petition suggests that Westinghouse relied on the Shield Law to preclude discovery by petitioners about the absence of a videotape that showed Coughlin entering the club on October 11 and that, petitioners say, would have shown that Coughlin was carrying a "48 book." In fact, however, Westinghouse told petitioners that no tape was made of Coughlin's entry, and it permitted petitioners to depose KYW's cameraman to inquire about what had happened. At that deposition, the cameraman explained that he was recording events at the club from a mounted camera at a window in a home across the street from the club; that he was in another room of the house when Coughlin pulled up to the club in his car; that as soon as he was aware of Coughlin's arrival, he ran to the room where the camera was mounted and got there in time to see Coughlin but not to videotape him; and that he then stayed at the camera and was able to videotape

Coughlin's exit a few moments later. The cameraman also testified that Coughlin had nothing in his hands when he entered the club. Petitioners' suggestion that Westinghouse hid behind the Shield Law to prevent discovery about this issue is entirely false.

In sum, the overstated difficulties of proof advanced by petitioners are not great enough to warrant invalidating a statute that at least 26 state legislatures have determined is necessary to foster freedom of the press. This issue lacks sufficient merit for this Court to grant certiorari to consider it.

CONCLUSION

The petition for certiorari does not present an issue that merits review by this Court, and it therefore should be denied.

Respectfully submitted,

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EXCERPT FROM BROADCAST ON FEBRUARY 17, 1982

* * *

[MAURY] POVITCH: And right now, after months of investigation, I-Team reporter Stan Bohrman is here tonight with a special report. It's called After Hours on American Street.

Stan.

MR. BOHRMAN: Maury, like many of the stories the I-Team has done, this one began with a simple telephone call from some people who needed help. They told us that their Center City neighborhood was being disrupted by an after-hours drinking club that appeared to be openly flaunting State liquor laws. They told us they had asked the police and the State Liquor Control Board for help, but they haven't gotten any. So they asked us to come to their street and look for ourselves, and look we did.

We took our hidden I-Team camera to their neighborhood, and we found out they were not exaggerating at all when they said they had a problem.

While we were on the street, we observed some very questionable activity by some members of the Philadelphia Police Department. We also discovered some serious questions about the way the LCB was doing its job.

You should know from the outset that this is a story that some people do not want you to see. But despite all the obstacles, the I-Team stayed with the story for almost a year, and now we want you to see it.

One final technical note on this. Much of the video tape of this report was shot with a special nighttime lens which records only in black and white, so don't worry about the color on your television set.

All right. Now, let's go after hours on American Street.

This is the 600 block of South American Street in Queen Village. Now, you wouldn't know it to walk down this street during the day, but a war has been going on here. By day, this peaceful block, wedged between South and Bainbridge Street, is a quiet residential neighborhood that appears to offer the finest in Center City living.

And while there are many shops and restaurants just steps away, the noise and congestion they sometimes bring very rarely spills over onto this block.

But in the middle of the night, after most of the people who live here have gone to bed, a light goes on in front of this building in the middle of the block. And that's when the problem starts.

Groups of people, often loud and boisterous, parade down the street headed for something called the Ukrainian American Citizens Association of South Philadelphia.

(Demonstration)

MR. BOHRMAN: Up until a year ago, this place was so quiet that some of the neighbors didn't even know there was a club here. But in the fall of 1980, a group of people who don't live on this block turned this place into a full-fledged after-hours drinking club, and that's when the battle lines were drawn.

The people who live here say that activity in the club has totally disrupted their lives and shattered the peace of the neighborhood. They also insist that the activities of the club violate the State's liquor laws.

The people who live on American Street used to think that the police or Liquor Control Board would help them solve their problems that they were having with the club. But after a year of complaining to both agencies,

they were beginning to wonder whose side they're on. And that's what prompted them to ask the I-Team to look into the situation here.

Now, to understand how the problem here developed, you have to know something about Pennsylvania's liquor laws. Under those laws, regular bars or taprooms must stop serving drinks at 2:00 in the morning. Only non-profit private clubs licensed by the LCB are allowed to serve liquor for an extra hour until 3:00 a.m.

The private clubs are supposed to be just that, clubs. They're not supposed to be fronts for bars.

To get a liquor license, the club must also have "some primary interest in activity to which the sale of liquor and beer is only secondary." Those and a host of other rules for clubs sound pretty strict. But as the people who live on American Street have learned, there's a big difference between strict rules and strict enforcement, and that's what has them hopping mad.

Phil Behr and his family moved in across the street from the club last summer. They had no idea what they were getting into.

MR. BEHR: I understand the club has a capacity of 100 people, but we've seen as many as 200 people in the club, and at one time. They were loud and rowdy. They had been drinking all night.

They often throw up in our yard, which is what happened last night. They often urinate in the streets. It's hardly civilized living.

MS. CASTINEIRA: Nobody can sleep at night in the street, nobody, because the noise is terrible. Police coming all the time, and fights in the street.

And we have the glasses and bottles and all this stuff in the front of the door. They urinate in my door. I saw it. And all those noises, we cannot sleep.

MR. BOHRMAN: Those complaints are nothing new. For more than a year, residents of American Street bombarded City and State officials with letters and phone calls.

And when they didn't get any results, they asked the I-Team to take a look at what they were living with, and take a look we did.

We set up our hidden camera several nights last year, and we found that the people who live here are right. You can hardly call this place a small ethnic social club or even an ethnic club at all.

Here's a sample of what we saw. Because it was shot with a special night lens, the pictures are in black and white.

3:00 a.m., Saturday, October the 10th, the quiet of American Street is shattered when a woman yells at her friends.

(Demonstration)

MR. BOHRMAN: A few minutes later, the neighbors were treated to this scene.

(Demonstration)

MR. BOHRMAN: At 4:00 a.m., a full hour after the club is supposed to be shut down, the residents of American Street are confronted with this scene.

(Demonstration)

MR. BOHRMAN: At 3:28 a.m., Saturday, October 17th, this man comes out of the club and shatters the early morning silence with his portable radio.

(Demonstration)

MR. BOHRMAN: The residents here who managed to fall asleep after that were reawakened a short time later by this rowdy bunch.

(Demonstration)

MR. BOHRMAN: Some of the club's patrons have used American Street as a public toilet.

And this gentleman left the club around 3:40 a.m. one night in February of last year and urinated on a neighbor's steps.

And this man came out of the club early on a Saturday morning last October and relieved himself on the street.

Apparently, his friend also regarded American Street as a public toilet.

Now, in case you are wondering, the club does have a bathroom. But, apparently, some of those patrons prefer the steps and sidewalks of American Street.

Neighbors here complained that they often have to hose down their front walks in the morning. And the I-Team found that despite repeated protests by the residents here, little has been done to stop people from leaving the club with beer bottles. A while later, this man walked out of the club with another beer bottle.

The problems here have all meshed together to make life particularly unpleasant for the residents here. Like this night last October, when we saw everything, the noise, the beer bottles and the drunks. It's 4:00 a.m. on a Sunday morning, and this man has obviously done his share of partying for the night. He was followed by this group, some of whom left with drinks in their hand. Someone already had left a beer bottle on the steps here.

(Demonstration)

MR. BOHRMAN: There was plenty of noise before his friends finally led this man down the street.

(Demonstration)

MR. BOHRMAN: When the club finally closed its doors almost ten minutes after four, these two men came out with their unfinished drinks. Now, more than an hour after legal closing time, peace and quiet finally settled on American Street.

(Demonstration.)

MR. BOHRMAN: The people who live on this street are basically law-abiding citizens who say they used to believe that local and State government would be responsive to their complaints. Last fall, the frustration of being ignored for more than a year got to be too much for some of them and they sent their own message to the club's operators.

Now, in the event that you have just joined us, I would like to remind you that you are watching a special investigative report by Channel 3's I-Team on this expanded edition of Eyewitness News.

And as we've shown you thus far in the report, the lives of the residents on the 600 block of South American Street in Queen Village has been disrupted for more than a year now by problems associated with an after-hours drinking club, a club that opened up right in the middle of their block.

Fed up with the drunkenness, the rowdiness, and the late night noise of the club's so-called clientele, the people who live on the street did what most of us would do, really, they asked the Police Department for help.

The trouble is that over the last year, the residents of American Street saw a lot of police officers at the club, but the problem there didn't go away; if anything, they got worse. And that's when some of the residents began to feel that some police officers were more interested in taking care of the club than in helping them restore peace and quiet in the neighborhood. And you'll see why

they feel that way, as we continue now with our special report, After Hours on American Street.

Dr. Judy Kodroff is a psychologist and college administrator. She lives in the house adjacent to the Ukrainian American Club, here in the 600 block of South American Street.

She told us that on many nights, the noise from the club was so bad, she couldn't sleep. In the fall of 1980, Dr. Kodroff began taking notes of the activity she saw in the street below her window, activity that sometimes involved Philadelphia Police Officers.

DR. KODROFF: When I got concerned about what police were going to be able — were going to do to help us was when the owner and the woman that was with him got into the police car and they drove away, and that was, I guess, about 4:15 one night.

After that, you know, I noticed a lot of other police officers going into the club and leaving the club during the time it was open, and also noticed that there were police cars when it wasn't open.

One night, I saw a police car come at — shortly after 4:00. And because I was curious as to what a policeman would be going in there at 4:00 for, I stayed up so that I could see when he left. And he didn't leave until 5:00 in the morning.

MR. BOHRMAN: Another neighbor, who said he was afraid to talk to us on camera, said that on two different days, he saw uniformed police officers at the club while it was being renovated. He said the officers appeared to be working for the club and were supervising the clean-up there.

But the incident that really got Dr. Kodroff worried took place on Valentine's Day of last year. She told us that as she watched from her window overlooking the

street in front of the club, she saw an encounter between several police officers and this man, Ken Adams, the club's manager. She told us the incident involved Adams, a female officer in car 35, and two male officers in cars C-111 and car 3A.

DR. KODROFF: 35 and C-111 went inside the club. And when they were in the club, Ken Adams came out and talked to 3A. When Ken went back in the club, C-111 and 35 came out, and C-111 got into a pretty heated argument. 3A banged his fist on the car and shouted — (beep) — a number of times, and then he said "this is my club."

My judgment of what that dispute was, was that C-111 had come to investigate something that had been reported to him that was going on in that club that made it necessary for him to look into what was happening there and that 3A did not want him to do that. That — that would have been my judgment of the argument.

MR. BOHRMAN: February, a year ago, we took our hidden I-Team camera to American Street to watch the police activity, but our initial efforts weren't very successful.

Someone apparently didn't want us watching, because at 2:00 a.m. on the morning of February 22nd, a woman called the police emergency number and made an anonymous and false complaint that a woman had been dragged screaming into our van. That false report resulted in seven police cars converging on the scene. Someone could have been injured in the incident since at least one police gun was drawn.

The officers got quite a surprise when cameraman Greg Meyer appeared in the door of the van.

(Demonstration)

VOICE: Do you have a woman in here?

MR. MEYER: No. We don't have anyone in here but a tape recorder and the camera the whole time.

VOICE: The whole time.

MR. MEYER: The tape recorder and the camera are on the entire time.

(Inaudible conversation)

VOICE: Is there a female in there?

MR. MEYER: No, there is not. There never was or ever will be.

(Inaudible conversation)

VOICE: Do you have a warrant? I object to this.

(Inaudible conversation)

VOICE: We didn't need a warrant.

VOICE: Can I make a phone call?

(Inaudible conversation)

VOICE: Okay. Now, who are you?

MR. MEYER: Greg Meyer.

VOICE: Let me see some identification.

(Inaudible conversation)

MR. BOHRMAN: That incident was investigated by the Police Internal Affairs Bureau.

Because she had witnessed the incident, Dr. Kodroff was questioned by detectives. She told them a lot more than they expected, and that led to a much wider investigation.

DR. KODROFF: I decided that I was going to tell them that I had called the I-Team because of the activity that was going on next-door.

MALE INTERVIEWER: Including the police activities?

DR. KODROFF: Absolutely, yes.

MR. BOHRMAN: Internal Affairs questioned all the officers involved in every incident Dr. Kodroff reported seeing from her window. In each case, the officers denied the incidents had taken place or gave a different version of the events.

Take the case of the police car Dr. Kodroff said she saw driving the club manager and a woman away from American Street one night in November of 1980. That was car 38. The officer assigned to that car that night denied ever being on American Street, and offered his written patrol log as evidence of that claim.

DR. KODROFF: When they drive under my window, the numbers on the police cars are written in — are printed in very large letters on the top, and it would have been 38.

MALE INTERVIEWER: And there's no doubt in your mind?

DR. KODROFF: Absolutely no doubt at all.

MR. BOHRMAN: Well, seeing is believing, as they say.

And in just a few moments, our I-Team hidden camera will show you some police officers at the Ukrainian Club, whose official patrol log show that they were somewhere else.

On April 28th of last year, Police Commissioner Morton Solomon issued a report saying the Department had investigated Dr. Kodroff's allegations of police misconduct at the Ukrainian American Club. He stated that

a two-week surveillance of the club by the Internal Affairs Unit "failed to reveal any evidence of police misconduct." Solomon did concede that some officers had spent unnecessary amounts of time in the club while performing club checks, adding that "the necessary corrective action" had been taken.

We asked Dr. Kodroff if she noticed any change on American Street after the investigation.

DR. KODROFF: For quite a long time, the police cars parked where I couldn't see the numbers. And I knew after that that there was still police going in the club because I would see them walking up from Bainbridge Street or from South Street, but I couldn't tell who the cars were.

MR. BOHRMAN: Dr. Kodroff and the other neighbors didn't know it when they told us about police activity that they saw at the club, but back in 1974, the Pennsylvania Crime Commission issued this report on police corruption in Philadelphia that described activities strikingly similar to what the residents saw.

In this 1974 report on police corruption in social clubs, the Commission noted that many of these clubs stay open for at least an hour after the legal 3:00 a.m. closing time, because that extra hour means a lot of money. "The temptation is great, and a number of clubs in Philadelphia cannot resist," the Commission stated.

The Commission also said the requirement that Philadelphia Police Officers enforce the 3:00 a.m. closing time "provides a situation ripe for corruption."

Back in 1974, the Crime Commission conducted extensive surveillances on clubs and came to this conclusion about how the police handled their duty to close them at 3:00 a.m.

VOICE: When the officers entered the club at 3:15 a.m., there was never any action on their part to close the club. Often they came, chatted with the owner, made some notations and left. It was, if anything, a sham performance of their duty, intended to provide a record in case questions of impropriety were raised in the future. It was obvious to the agents present that 4:00 a.m. was the intended closing time.

MR. BOHRMAN: The report cited a number of examples of clubs paying off police officers to ignore the 3:00 a.m. closing time.

Today, eight years after that report was issued, one of the principal complaints of the residents of American Street is that the Ukrainian American Club, in the middle of their block, has frequently stayed open after the legal closing time.

This is the Third Police District. Officers who work out of here patrol the neighborhood where the Ukrainian American Club is located. Captain Russell Taylor is the Third District Commander.

On March the 2nd of last year, he issued a written order instructing his men to enter the club at 3:30 a.m. and remain until all patrons left. That order superceded an earlier order that had set the time for the club check at 3:00 a.m.

Residents here were puzzled about why Captain Taylor would move the club check back to 3:30, since the law requires clubs to stop serving drinks at 3:00 a.m. It appeared to them that he had now, in effect, given the Ukrainian Club an opportunity to sell drinks for an extra half hour.

Captain Taylor declined to be interviewed for this report.

Early Saturday morning on the 10th of October, a police officer in car 314 showed up and entered the club at 3:31. Despite Captain Taylor's order that officers making the club check here were to stay until all the patrons had left, this officer left just four minutes later, making no effort to disperse this group on the street outside.

(Demonstration)

MR. BOHRMAN: At 3:57, car 314 returned to the Ukrainian American Club. You're watching him write on his patrol log. That's his official record of where he has been during his tour of duty.

Now, the Police Department told us that this officer's log sheet states that between 3:55 and 4:10 a.m., he was at two other locations in the Third District, not here at 610 South American Street. But as you can plainly see, he was here at the club. And at 3:59, he went inside.

(Demonstration)

MR. BOHRMAN: A few moments later, a noisy mass exodus began, almost a full hour after the legal closing time of 3:00 a.m.

(Demonstration)

MR. BOHRMAN: Finally at 4:12, the officer left the club and drove off after spending 15 minutes here. Now, remember, his log says he was never here during that time. That's what other police officers' logs showed in other cases; where Dr. Kodroff told the Internal Affairs Bureau she had seen officers hanging out here sometimes as late as 5:00 a.m.

Our camera was on American Street again early on Saturday, October the 17th. We saw four people enter the club after the 3:00 a.m. closing time. One of our I-Team reporters was also in the club on this night. The reporter had been admitted after the 3:00 a.m. closing time, and without the required membership card. Our

reporter also observed drinks being sold until 3:45. That's well past the 3:00 a.m. legal limit.

At 3:29 on this night, an officer from car 35 entered the club, stayed for one minute and left, again disregarding the written orders to remain until all patrons had left. Despite the fact that drinks were being served illegally when the officer checked the club, the Police Department told us he filed an official report of his visit indicating that nothing unusual took place that night.

Nothing unusual? Well, in a way, he may be right, you see, because as far as the residents who live around here are concerned, serving drinks here after hours really isn't unusual at all.

At 4:01 a.m., car 35 returned to the club. Although the officer got out of his car and went in, he failed to inform police radio of his presence here.

MR. FAIR: When the police officer arrives at a scene, he gives at least three pieces of information, the car number, the location, and the nature of — of the incident that he's going in on.

MR. BOHRMAN: Police officers are frequently reminded of that regulation by the police radio.

POLICE RADIO: Advisory to all police, patrol vehicles must notify radio of their arrival on all assignments by giving car number and the words "on location".

MR. BOHRMAN: The purpose of that regulation is to allow the radio room to keep track of available manpower and to protect police officers. If an officer is attacked or injured and fails to call in within a certain period, other units could be dispatched to his location to assist him.

Sources have told the I-Team that if an officer enters a location without telling radio where he is, he generally does not want it known that he's there.

On this occasion, police radio called for car 35 while he was in the club and got no response. And while the officer was in the club, patrons leaving were creating quite a racket out in the street.

(Demonstration)

MR. BOHRMAN: At 4:07, the officer left the club and walked to his car down the street. However, he did not report back into police radio as being available until 4:14.

So, once again, on this night, the police allowed the Ukrainian American Club to operate for almost a full hour after legal closing time.

But the most suspicious police activity we saw on American Street took place early Sunday morning on the 11th of October. We saw eight people enter the club after the 3:00 a.m. closing time. No police officer showed up here until car 39 arrived and an officer went in at 3:52. Five minutes later, the officer came out of the club and drove away. By our count, there were at least 50 people still in the club.

After the officer left, people started leaving, some of them carrying beer bottles, another sore point with neighbors who can't understand why the police had failed to stop this type of activity here.

Now, here's where things really start to get interesting. At 3:57, car 35 told the police radio to hold him out at headquarters for paperwork. Now, remember that number 35. You're going to see it in just a moment.

Meanwhile, at 4:04, car 39 arrives back on American Street, and the officer reenters the club, once again without informing police radio of his presence here. The Police Department told us that this officer stated on his official patrol log that he was at another location in the Third District at this time.

At 4:11, the officer in car 39 leaves the club and drives away. All the patrons have left and the club appears to be closed for the night. But then car 35 drives up. Remember, according to his call to police radio, he's at headquarters doing paperwork. Car 35 slowly backs up, looks over the street and drives off.

Seven minutes later, car 35 reappears outside the club, and the officer hurries inside. As far as police radio knows, car 35 is still out at headquarters doing paperwork. Well, the only paperwork we saw him doing was carrying this envelope out of the club less than a minute after he went in.

According to the Police Department, there's an unexplained 20-minute gap in car 35's patrol log for this time period on this night.

Early last month, word got around the Police Department that the I-Team had been on American Street with a hidden camera and had taped damaging video of officers at the club. Suddenly, there was a dramatic change in the way officers in the Third District were checking the club.

Phil Behr, who lives directly across the street, received a visit from a sergeant one night promptly at the 3:00 a.m. club closing hour.

MR. BEHR: He and another officer were on the street. One officer went inside the club at 3:00 to make sure that the club was operating under the rules and that no drinks were being served and that it was closed. The police have generally been coming at the closing hour and have been in the street telling people do not make noise and to behave properly.

But the problem I have is that why did it take a year for this all — all to come about.

MR. BOHRMAN: Another strange turn of events took place just one month ago, early Saturday morning, on the 16th of January, when undercover vice squad officers raided the club. They arrested club manager Ken Adams for serving nonmembers.

The Police Department told us that the raid resulted from a routine check of social clubs in the area. But the people that live here wonder where the vice squad was during the last year when they repeatedly complained to the Police Department about the liquor law violations here.

And as we have just shown you, these violations seem to have escaped the notice of the police officers who have been right here night after night checking the club.

Now, for those of you who may have joined us a little late, I would like to remind you that you are watching a special investigative report by Channel 3's I-Team on this expanded edition of Eyewitness News.

As we showed you earlier in this report, the residents of South American Street began to wonder just whose side the police were on. As the residents battled to eliminate the problems they were having with an after-hours drinking club on their block, and as you've just seen through the lens of our hidden I-Team camera, some of the police activity that's taken place on American Street raises some very serious questions, indeed. The police activity we video taped last October, the activity you just saw, is now the subject of a new investigation by the Police Department's Internal Affairs Bureau.

An investigation was ordered by Police Commissioner Morton Solomon after we told him what we had seen on American Street. We'd like to point out right here that Commissioner Solomon made every effort to respond to our questions about those incidents. And

those efforts included providing us with access to official records of the cars and officers that we video taped on American Street.

As the Chief of the Internal Affairs Bureau told us, Commissioner Solomon wants to know if the Department has a problem in the Third District; and if it does, he wants it cleaned up.

And a note here on the police officer we showed you leaving the club with an envelope on October 11th at 4:17 in the morning. That's the same officer who told police radio he was at headquarters doing paperwork and then showed up at the club. We attempted to interview that police officer, but he refused to talk to us.

We'll have more to show you about the police activity on American Street that night in a special follow-up report tomorrow on Eyewitness News.

* * *

EXCERPT FROM BROADCAST OF FEBRUARY 18, 1982, 5:30 P.M.

MR. BOHRMAN: We found, for example, that some officers had been showing up at the Ukrainian Club and spending time inside, while stating on their official patrol logs that they were somewhere else.

Now, as part of their regular patrol duty, police officers are supposed to enforce the State law that requires social clubs to stop serving drinks at 3:00 a.m. But our investigation showed that although police officers were present at the Ukrainian Club, they didn't seem to be doing much to enforce that law.

For example, on the morning of October 17th, we saw a police officer enter the club at 3:29, stay for a minute, and leave. He filed an official report of this visit indicating that nothing unusual had occurred at the club when he checked it. But we had a reporter inside the club that morning. And our reporter saw the club's bartender serving drinks until 3:45 a.m., well past the 3:00 a.m. limit.

The officer's failure to report or do anything about that activity is now the subject of a Police Department investigation.

But the most suspicious police activity we saw on American Street took place early Sunday morning on the 11th of October. We saw eight people enter the club after the 3:00 a.m. closing time. No police officer showed up here until car 39 arrived and an officer went in at 3:52. Five minutes later, the officer came out of the club and drove away. By our count, there were at least 50 people still in the club.

(Demonstration)

MR. BOHRMAN: After the officer left, people started leaving, carrying beer bottles, another sore point

with neighbors who can't understand why police have failed to stop this type of activity here.

Now, here's where things really start to get interesting. At 3:57, car 35 told the police radio to hold him out at headquarters for paperwork. Now, remember that number 35. You're going to see it in just a moment.

Meanwhile, at 4:04, car 39 arrives back on American Street and the officer reenters the club, once again without informing police radio of his presence here. The Police Department told us that this officer stated on his official patrol log that he was at another location in the Third District at this time.

At 4:11, the officer in car 39 leaves the club and drives away. All the patrons have left, and the club appears to be closed for the night. But then car 35 drives up. Remember, according to his call to police radio, he's at headquarters doing paperwork. Car 35 slowly backs up, looks over the street and drives off.

(Demonstration)

MR. BOHRMAN: Seven minutes later, car 35 reappears outside the club, and the officer hurries inside. As far as police radio knows, car 35 is still out at headquarters doing paperwork. Well, the only paperwork we saw him doing was carrying this envelope out of the club less than a minute after he went in. That officer is Patrolman James Coughlin.

MR. BOHRMAN: We wanted to ask Officer Coughlin about the events of October the 11th, so we sent I-Team reporter John Toth to interview him last week, but Officer Coughlin didn't want to answer any of our questions.

MR. TOTH: Can I ask you a few questions, sir?

MR. COUGHLIN: I want to know what — what's this about?

MR. TOTH: Well, I wanted to ask you that on October 11, 1981, you were in car 35, and did you make out a 48 report about vandalism over at the Ukrainian Club at about a quarter after 12?

Greg, don't go up the steps.

MR. COUGHLIN: What's you name?

MR. TOTH: Pardon me, sir?

MR. COUGHLIN: Let me — let me — Let me get your name, will you?

MR. TOTH: Sure.

MR. COUGHLIN: This — this here is harassment.

MR. TOTH: Sir, can you tell us if you went into headquarters to do paperwork that night at about 4:00, October 11th?

MR. COUGHLIN: (No response.)

MR. BOHRMAN: We wanted to ask Officer Coughlin about the vandalism incident at the Ukrainian Club early on the morning of October the 11th, because his name is on the official report of that incident.

In fact, according to the report called a 48, and the official patrol log of car 35, Officer Coughlin was in car 35 for the entire midnight to 8:00 a.m. shift on that day.

Well, our hidden I-Team camera was on American Street at 12:50 that morning when car 35 showed up to handle the vandalism complaint from the club. And the problem is, is that the officer who handled this call does not appear to be Officer Coughlin. Whoever this officer is, he did not appear to be familiar with car 35. For example, it took him four tries to find the right key to start the car when he was leaving.

We can't explain all this, nor can we explain why Officer Coughlin was not equipped for street patrol when

he arrived at the club at 4:17 that morning. You'll notice, he has no nightstick, no uniform jacket and no hat when he shows up here, all standard items officers on patrol are required to have.

We should also note that the Police Department says the official patrol log for car 35 contains an unexplained gap between 4:00 and 4:20 a.m., the very 20-minute period during which we saw Officer Coughlin here on American Street. And we should note again here, car 35 had told the police radio at 3:57 a.m. that he was at headquarters doing paperwork.

(Demonstration)

EXCERPT FROM BROADCAST OF FEBRUARY 18, 1982, 6:00 P.M.

MR. BOHRMAN: Using our hidden I-Team camera, we showed how some police officers were appearing at the club at 610 South American Street, but doing little or nothing about apparent violations in the liquor laws there. We also reported that the activity we saw was similar to questionable police activity observed in 1974 by the Pennsylvania Crime Commission in its investigation of police conduct at social clubs in the City.

Today I-Team manager Tony Lame talked to one of the lawyers who supervised that investigation. Agents working for attorney Barbara Bailey back in the early 1970's had observed police activity in a number of clubs and concluded that many officers were engaged in what the Commission called, "a sham performance of their duty to enforce the 3:00 a.m. closing hour." That's the same complaint the residents of American Street had about the police on their block in 1981.

We asked Ms. Bailey to view our report and compare the video we shot with the actions her agents saw almost ten years ago.

MS. BAILEY: The pattern of activity was precisely the same that we observed in 19— basically 1972 through '74.

MR. BOHRMAN: We then showed her the video tape we shot on American Street early October the 11th last year. That morning, an officer in car 35 told police radio he was at headquarters doing paperwork and then showed up on American Street and picked up an envelope at the club.

MS. BAILEY: I'm a lawyer, so I have to analyze it as a lawyer. And what I've seen is a man saying he's in point A, when he is indeed in point B, which immediately raises my suspicion.

You have him drive up and sort of check out the location, which is what people often do to make sure they're not being watched. He then comes back and he gets out in his shirt sleeves. That's important because policemen are trained, and they do it absolutely automatically, to have on a hat and coat and a nightstick, or whatever other weapon they have in their possession when they go up to investigate a complaint or to conduct some official business.

All that leads me to believe that he was not involved in official business when he went in.

MR. BOHRMAN: We wanted to ask that officer what was in that envelope, but he wouldn't talk to us when we tried to interview him last week.

MR. TOTH: Sir, can you tell us if you went into headquarters to do paperwork that night at about 4:00, October 11th?

(Demonstration)

EXCERPT FROM BROADCAST OF FEBRUARY 19, 1982

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MR. BOHRMAN: All right. I'd like to shift gears, if I may, for just a moment. I'd like to talk about the Police Department and Tom Garvey, who is the President of the Fraternal Order of Police, is here.

Tom, what appears to be some very strange activities by certain members of the Police Department was taking place between the hours of 3:00 and 4:17 on a few mornings. Can you explain to me what those officers were doing?

MR. GARVEY: Well, first of all, let me explain that I deal in evidence. I have to see what evidence is and what evidence does and how concrete it is. And based on what you've shown so far, I'll have to say either most people are watching Dallas or they're wondering what happened to McClain's Law.

MR. BOHRMAN: Be that as it may —

MR. GARVEY: Let me finish my statement. You asked me, and I'll reply.

MR. BOHRMAN: All right.

MR. GARVEY: You made the statement that you must know something about liquor laws. Now, I would hope that you do know that police in the City of Philadelphia cannot remove anyone from a private club. We're not, by law, allowed to. They're allowed to stay in any club as long as they're members.

All we can do is, if we see sales, is arrest the bartender. They can stay there all night, as long as they want. They can bring in a case of liquor, as members, and stay there all night. They have that right.

What appears to me has happened here, very honestly, is some very affluent members of the Society Hill neighborhood got in touch with the District Attorney's office and the Governor's office and made certain things happen that the I-Team got involved with.

But if you were going to ask me what wrongdoing whatsoever took place by police, the answer on what you showed here is zero.

MR. BOHRMAN: Well, let me deal with one specific. We saw two instances where police officers went by people who were obviously inebriated, making noise between 3:00 and 4:00 in the morning, and they didn't so much as ask them to be quiet and to move on; they walked right by them, and one was holding a beer bottle at the time.

MR. GARVEY: What you showed was clips. And I would love, I hope you would turn over to our Department, the entire film.

You mentioned one year you worked on this. Yet, you show three to four nights of split clips, not the entire film.

But, understand, there are 372 clubs in the City of Philadelphia, 2900 liquor licenses. In that district alone, at that particular workshift, there may have been 13 vehicles. So if all 13 vehicles went to check a private club, not only the neighbors on American — their street, or any district, or any other street in that district, there was no police coverage if they were just checking clubs.

My opinion is that there's one heck of a lot more serious things going on than a noisy club. And every house that lets out a private party would, in all likelihood, it would be just as noisy.

MR. BOHRMAN: So who do you think should be doing the club checks, if the police shouldn't be doing it?

MR. GARVEY: I think it could be the Liquor Control; it could be a combination. But the manpower may not be there for either.

Then it comes down to Government to provide the funds to do it.

MR. LAME: Let me just jump in here one minute.

Mr. Garvey, I think that's a very serious question, and that is, do you think the Police Department should be tying up its manpower doing club checks in the first place?

Let's — let's be realistic. The Crime Commission looked at this once before. They said this was a situation that was ripe for corruption. It's — it's a situation that takes the officers off the street, out of patrol, where I'm sure most people would rather have them.

And I think what we're trying to get at here is how can the various government agencies solve the problems that the people on American Street had and the three or 400 other people who have called this station since this piece went on.

We're not particularly interested in saying that two or three police officers didn't do their job. That's not really what this is all about. The question of — what we're really trying to get at here is how do we solve the problems of the people in these various neighborhoods.

MR. GARVEY: Well, I think, again, it's priorities. And you deal with a situation of economics, as the Senator does and City Government does.

And our priorities are a 26 percent increase in crime, none of which was touched on this subject. So our priorities are reducing crime, which none of this touches on.

Do we like doing club checks? I'm sure we'd prefer to be out looking for burglars. Do we like covering school crossings? No. I prefer to go out and look for the most serious crime.

So the answer is, in an economic situation where the money is not available, we perform to the best of our ability. And I think that film shows it.

MR. BOHRMAN: Mr. Garvey, obviously, you seem to think nothing was done wrong by the police in what you saw, and everything seems to be pretty much on the up-and-up.

However, we have spoken with Police Commissioner Solomon's office, and we also have spoken with District Attorney Ed Rendell, and they are both extremely concerned about what we have shown on television. They are concerned about the police activity we saw.

Now, are you going to just say that that's — that nothing happened, that it's — in a cavalier way, that it is just simply benign, nothing?

MR. GARVEY: No. Let me say that what you've shown in my eyes says they did nothing wrong.

I'll cover just one incident where you characterize — characterize, by innuendo, a certain officer who come out of the club with what you portrayed as an envelope.

Let me tell you about that officer. That officer was the first night he ever worked 12:00 to 8:00. He was a rookie. He come off a funeral leave where his father died.

The dress that night was optional, and you said he was without proper uniform. It was optional. He was wearing what was proper for that night.

That officer had a 48 book in his hand, not an envelope as the characterization was. That officer worked that sector for the first time that night, didn't know

where the club was. So that officer, in all rightfulness, was right in what he did. But the characterization was the opposite.

MR. BOHRMAN: What about the alleged falsification of the official police records by some of these officers? We have seen some of the actual records, sir.

MR. GARVEY: The allegation may be made. That officer, I'm sure, will be able to explain that log. But he's not had that opportunity.

MR. LAME: Mr. Garvey, let me ask you one other question, since we're talking about this.

On at least one occasion when we were in the club and they were serving drinks there after hours, an officer went in, he came out, he filed a report saying nothing unusual was going on.

We've talked to the Liquor Control Board. They say their file on this club shows not one single report from the Philadelphia Police Department indicating any violations at all of the liquor laws at this club. I would say that the people who live on American Street find that hard to understand.

MR. GARVEY: I would say, very honestly, you're right. There are a lot of clubs that serve drinks after the officer leaves. They may reopen. Because we don't have the manpower to have them stay in there from 3:00 until 4:00 to make sure that everyone leaves, and we can't force them to leave.

So you're right, and she's right. They may, in fact, serve after the officer leaves. But that is not a priority, trying to get clubs to get rid of people.

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